Before the FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554

In the Matter of)	
)	MB Docket No. 12-3
Sports Blackout Rules)	

COMMENTS OF NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA")¹ hereby submits its comments on the Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding.

INTRODUCTION

The Commission proposes, in the Notice, to eliminate its sports blackout rules, "which prohibit certain multichannel video programming distributors ('MVPDs') from retransmitting, within a protected local blackout zone, the signal of a distant broadcast station carrying a live sporting event if the event is not available live on a local television broadcast station." Because of changes in the video marketplace and changes in the regulatory environment, the sports blackout rules have become an anachronism. Whether or not the purpose of the rules – to protect the live gate of sports teams – remains a reasonable and legitimate regulatory goal, the rules today have no practical effect and therefore do nothing to serve this or any other purpose.

The Commission is right to re-examine the continuing viability of rules that may have outlived their purpose. And when, as in this case, such rules have no continuing purpose or practical effect, the Commission is right to propose their elimination.

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NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest provider of broadband service after investing over \$210 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 27 million customers.

I. THE SPORTS BLACKOUT RULE NO LONGER SERVES ANY MEANINGFUL PURPOSE.

When the sports blackout rule was adopted in 1975, it was, in most cases, the only way that a sports rights holder could effectively prevent a cable system from carrying a live broadcast, on a distant signal, of a game being played in the cable system's local community. At that time, cable operators could freely retransmit both local and distant broadcast signals without obtaining permission from the copyright owners of the retransmitted programming on those signals or from the broadcast stations.² The Supreme Court had held that such retransmission did not constitute a public performance of the copyrighted programs on the broadcast stations and was not subject to copyright liability. The Copyright Act of 1976 amended the law to impose such liability on the retransmission of broadcast signals, but it created a compulsory license that allowed cable operators to continue to retransmit broadcast signals without having to negotiate with and obtain permission from the copyright owners.³

So, if a baseball team licensed a local broadcaster to telecast the team's road games but authorized no local broadcasts of its home games in order to protect its ticket sales, a cable operator, absent the sports blackout rule, would have been able to obtain a distant signal that carried the game – perhaps a network "Game of the Week" generally available on network affiliates but not allowed to be carried by the affiliate in the home team's market. Or, if the NFL required a broadcast network to black out a home game of a team on its affiliated broadcast station in the market where the game was being played, cable systems in that market, absent the sports blackout rule, would have been able to carry a distant station that was carrying the game without obtaining permission from the NFL or the distant broadcast signal.

Broadcasting Sys., Inc

3 17 U.S.C § 111.

See Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968); Teleprompter Corp. v. Columbia Broadcasting Sys., Inc., 415 U.S. 394 (1974).

That is no longer the case. Ever since the enactment of the Cable Consumer Protection and Competition Act of 1992, cable operators have had to obtain the consent of commercial broadcast stations before retransmitting them. This "retransmission consent" requirement effectively enables sports teams and sports leagues to achieve contractually what the sports blackout rule provided by regulation. Sports leagues and their teams that want to enforce blackouts of home games to protect ticket sales can (and do) include provisions in their contracts with networks and with broadcast stations other than superstations that prevent broadcast stations from granting consent for the retransmission of their signals by cable systems in distant markets for such purposes.

Moreover, most sports leagues and teams now provide a large number of their games on *non-broadcast* program networks – national satellite-delivered networks and regional sports networks ("RSNs") – that are carried by cable systems. This means, first of all, that the leagues and teams can contractually ensure that these networks not only black out any home games that they do not want carried on local cable systems but also that the networks contractually bar their affiliates from authorizing out of market cable carriage. And, second, because so many home games are now carried by RSNs (and available to cable viewers) under contractual arrangements that amply compensate teams and leagues, the instances in which sports rights holders would seek to invoke the sports blackout rule has dwindled to insignificance.

Indeed, even in those cases where a league or team does not contractually prevent the distant signal retransmission of games into a home team's local market, there are factors that make such retransmission by cable operators highly unlikely. In particular, under the terms of

⁴ 47 U.S.C § 325(b).

While the statute permits cable operators to carry certain grandfathered "superstations" without obtaining retransmission consent, the only remaining such superstation is WGN America, which has contractually obtained national distribution rights for programming it carries in order to make its signal "blackout proof."

the cable compulsory license, cable operators that choose to retransmit a distant signal even for one day – or even to carry a single game – must pay the same significant fee as if they had carried the station full-time throughout the six-month compulsory license accounting period. Especially given the increased carriage of home games on cable program networks and RSNs, the likelihood that operators would choose to incur such an expense is minimal.

For all these reasons, the question of whether the sports blackouts protected by the Commission's rule are or are not in the public interest is essentially irrelevant to this proceeding. So long as sports rights holders are permitted to enforce blackouts contractually via retransmission consent, agreements with cable networks, and agreements with cable operators, the rule will be redundant and its elimination will have no meaningful effect.

II. RULES THAT NO LONGER SERVE A USEFUL PURPOSE – OR, AS IN THE CASE OF THE SPORTS BLACKOUT RULE, ANY PURPOSE – SHOULD BE REPEALED.

Chapter 47 of the Code of Federal Regulations is full of rules adopted to address circumstances of earlier eras in the history of media and telecommunications. And eras in the history of media telecommunications are increasingly short-lived, as technological developments continually transform the converging video, telephone and data marketplaces. In these circumstances, it is sound administrative practice and sensible public policy to periodically clear out the regulatory underbrush – including rules that no longer serve any purpose and, worse, rules that have become counterproductive.

Many of the cable television rules implementing the 1992 Cable Act are of the latter type.

Adopted at a time when cable faced little competition in the provision of multichannel video programming, these rules were designed to give new competitors a boost and/or to prevent abuse

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⁶ See 37 C.F.R. § 201.17(f)(2)(i).

of market power. But applying such rules to what has become a vigorously competitive video marketplace can artificially, inefficiently and unfairly skew competition to the detriment of consumers. The Commission, Congress and the Courts have recognized the need to revisit the continuing need for these rules by, for example, repealing, sunsetting or invalidating various portions of rate regulation,⁷ program access,⁸ horizontal ownership⁹ and must-carry¹⁰ rules that had outlived their usefulness.

But it is also important to delete rules that have no practical impact. Such rules, when they remain on the books, merely serve to confuse those who are subject to such regulations as well as consumers who try to understand what the rules require. The sports blackout rule is a good example. The only ongoing sports blackout issue that continues to concern anyone today is whether it is right for a sports league like the NFL to prevent viewers from watching their teams' home games when the games are not sold out. But, as discussed above, the FCC's sports blackout rule plays no meaningful role in either facilitating or prohibiting such blackouts. Yet, many observers seem to think – and have led consumers to think – that that it is the FCC's rule, rather than the NFL, that *requires* these blackouts.¹¹

If the rule still had any significant effect in protecting the sports leagues' and teams' blackout policies, the FCC would be right to consider, as part of an ongoing re-examination of

⁷ See 47 U.S.C. § 623(c)(4), added by the Telecommunications Act of 1996.

⁸ See Revision of the Commission's Program Access Rules, 27 FCC Rcd 12605 (2012)

⁹ See Comcast Corp. v. FCC, 579 F.3d 1 (D.C. Cir. 2009).

See Carriage of Digital Television Broadcast. Signals: Amendment to Part 76, 27 FCC Rcd 6529 (2012), review denied, Agape Church, Inc. v. FCC, 738 F.3d 397 (D.C. Cir. 2013).

See, e.g., J. Breech, "FCC Looking To Eliminate Sports Blackout Rule," Dec. 19, 2013, http://www.cbssports.com/nfl/eye-on-football/24381034/fcc-looking-to-eliminate-sports-blackout-rule ("You might never have to go to another NFL game again because you'll be able to watch them all on TV. The Federal Communications Commission took the first step on Wednesday towards repealing its highly unpopular sports blackout rule. The rule has been in place since 1975 and prevents sporting events from being televised live if the event isn't sold out.")

old rules, whether the purpose of the rule – protecting the live gate of local sports teams -remained an important and legitimate governmental interest. But the Commission need not
decide that question. Because retransmission consent requirements and changes in the video
marketplace enable contractual enforcement of blackout policies, the rule no longer plays a
meaningful role in serving any such governmental interest.

CONCLUSION

For the foregoing reasons, the Commission has rightly proposed that the sports blackout rule be deleted.

Respectfully submitted,

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